

whether RBOCs should be allowed into the long-distance market is not relevant to the issue of whether AT&T should be classified as non-dominant.

V. CONCLUSION

163. In light of the above, we conclude that AT&T has demonstrated that it lacks market power in the overall interstate, domestic, interexchange market, and accordingly we grant AT&T's motion for reclassification as a non-dominant carrier. We also accept all of the voluntary commitments stated by AT&T in its September 21, 1995 *Ex Parte* Letter (and clarified in its October 5, 1995 *Ex Parte* Letter), and order AT&T's compliance with those commitments as stated in its letters. We note that AT&T's failure to comply with its commitments may result in the imposition of fines or forfeitures upon AT&T (pursuant to Section 503(b) of the Act) or a revocation of its licenses (pursuant to Section 312(a) of the Act).⁴⁴⁵ In addition, we will reject as unreasonable on its face any tariff filing that contravenes AT&T's commitments. AT&T remains bound by the Act and our rules, and the Commission remains committed to enforcing those rules through our investigation and complaint procedures.

164. Our reclassification of AT&T as non-dominant will result in the removal of all of its domestic residential services from Basket 1, 800 directory assistance service from Basket 2, and analog private line service from Basket 3, leaving AT&T's international services in Basket 1. Consequently, adjustments will have to be made to AT&T's API, PCI, and certain SBIs for Basket 1. We delegate authority for making the necessary adjustments to the Common Carrier Bureau.

165. Our decision in this Order relieves AT&T of the reporting requirements now imposed on dominant carriers. AT&T will instead be subject to the same minimal reporting requirements that apply to non-dominant interstate common carriers. Currently, interstate common carriers with annual revenues in excess of \$100 million are required to report their total annual revenues and their total investment. This report allows the Commission to track market shares on an annual basis. We expect that, in the absence of the more detailed information we have collected in the past from AT&T, this information may need to be slightly augmented in order to provide us with the information we will need to ensure that the industry continues to be highly competitive. We delegate to the Chief, Common Carrier Bureau, the task of determining what additional information should be collected from interexchange carriers, and of establishing an appropriate reporting requirement subject to approval by the Office of Management and Budget under the Paperwork Reduction Act. We expect any such requirement to be limited and non-burdensome.

⁴⁴⁵ See 47 U.S.C. §§ 312(a) and 503(b); *Revocation of the Licenses of Pass Word, Inc.*, 76 FCC 2d 465 (1980), *aff'd sub nom. Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982) (common carrier license revoked based on carrier's deliberate misrepresentation to the Commission).

166. AT&T's share of interstate calling is published quarterly and has provided a useful indication of the rapidly increasing competition in the interstate market.⁴⁴⁶ We believe this information should continue to be available until the Common Carrier Bureau has determined what additional information, if any, should be collected from interexchange carriers. Accordingly, we direct AT&T to continue to report its interstate access minutes as it has done since 1986.⁴⁴⁷

167. In order to ensure an orderly transition, this Order will be effective 30 days after its release.

168. Finally, as noted above, we intend to initiate a new proceeding to identify specific areas of the interstate, domestic, interexchange market that may raise policy concerns, and if there are any, to seek comment on possible remedies. In addition, we will closely monitor all of the areas where AT&T has made voluntary commitments. To the extent necessary or appropriate, we will institute proceedings to continue to protect consumers.

VI. ORDERING CLAUSES

169. Accordingly, it is **HEREBY ORDERED** that AT&T's motion for reclassification as a non-dominant carrier in the market for interstate, domestic, interexchange telecommunications services under Part 61 of our rules is hereby **GRANTED**.

170. **IT IS FURTHER ORDERED** that AT&T shall comply with the commitments contained in its September 21, 1995 *ex parte* letter from R. Gerard Salemmé, Vice President-Government Affairs, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (and clarified in AT&T's October 5, 1995 *ex parte* letter from R. Gerard Salemmé, Vice President-Government Affairs, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission), and which are summarized in this Order in Appendix C.

171. **IT IS FURTHER ORDERED** that AT&T's motion for reclassification as a non-dominant carrier in all international markets under Part 61 of our rules is hereby **DEFERRED**.

⁴⁴⁶ See, e.g., IAD 1995 Long Distance Market Share Report.

⁴⁴⁷ This reporting requirement was originally established by letter from Albert Halprin, Chief, Common Carrier Bureau, to D.J. Culkin, Corporate Vice President, AT&T, dated October 13, 1986. The reporting requirement was later reduced in a letter from Peyton L. Wynns, Chief, Industry Analysis Division, dated October 23, 1987.

172. IT IS FURTHER ORDERED that this Order will become effective 30 days after its release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

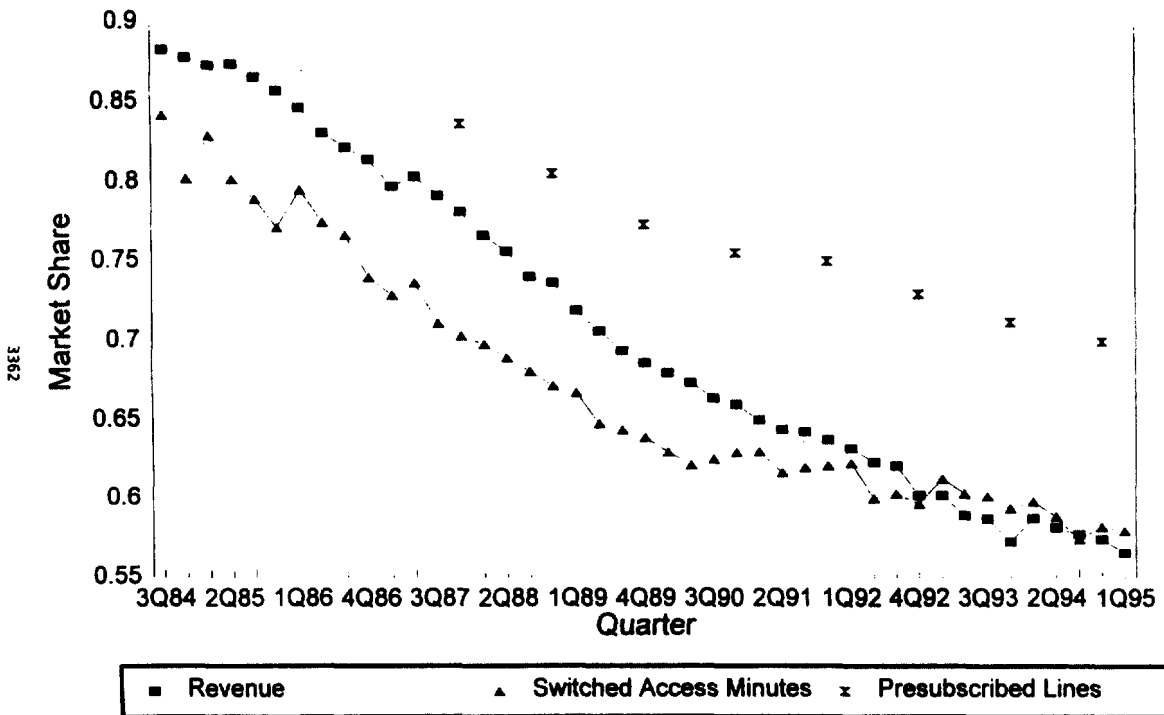
APPENDIX A

Ad Hoc IXCs (Ad Hoc IXCs)
Ad Hoc Telecommunications Users Committee (Ad Hoc Committee)
Affinity Network, Incorporated (ANI)
Alascom, Inc. (Alascom)
The State of Alaska (Alaska)
Alaska Telephone Association (ATA)
America's Carriers Telecommunications Association (ACTA)
American Petroleum Institute (API)
AT&T Corp. (AT&T)
Ameritex Operating Companies (Ameritex)
Anchorage Telephone Utility (ATU)
Bell Atlantic Corporation, BellSouth Corporation, Pacific Telesis Group and SBC
Communications, Inc. (BOCs)
Capital Network Systems (CNS)
Citizens for a Sound Economy (CSE)
Competitive Telecommunications Association (CompTel)
Custom Network Service Users Group (CNSUG)
Eastern Telecom Corporation (ETC)
Enterprise Telecom Services, Inc. (ETS)
Bureau of Economics, Federal Trade Commission (BOE/FTC)
The Furst Group, Inc. (TFG)
GE Capital Communication Services Corporation (GE Exchange)
General Communications, Inc. (GCI)
The State of Hawaii (Hawaii)
Ruth K. Kretschmer, Commissioner, Illinois Commerce Commission (Illinois Commerce
Commission)
Independent Data Communications Manufacturers Association (IDCMA)
International Business Machines Corporation (IBM)
LDDS Communications, Inc., d/b/a LDDS Metromedia Communications (LDDS)
LinkUSA Corporation (LinkUSA)
The Maryland Office of People's Counsel (MPC)
MCI Telecommunications, Inc. (MCI)
National Rural Telecom Association, National Telephone Cooperative Association,
Organization for Protection and Advancement of Small Telephone Companies and
United States Telephone Association (LBC Joint Commenters)
NYNEX Telephone Companies (NYNEX)
PhoneTel Technologies, Inc. (PhoneTel)
Public Service Enterprises of Pennsylvania, Inc. and New Enterprise Wholesale Services
(PSE/NEWS)
Oncor Communications, Inc. (Oncor)
SDN Users Group (SDN)
Sprint Communications Company, L.P. (Sprint)
SP Telecom (SP Telecom)

Utilities Telecommunications Council (UTC)
Telecommunications Resellers Association (TRA)
U S West Communications, Inc. (US West)
WilTel, Inc. (WilTel)

APPENDIX B

Figure 1
AT&T Market Share



Source: FCC, "Long Distance Market Share, First Quarter 1995"

Table 1
Average Best Prices

Minutes	Jan. 1, 1991	Jan. 1, 1992	Jan. 1, 1993	Jan. 1, 1994	Jan. 1, 1995	July 6, 1995	Percent Change
50	\$8.59	\$8.60	\$8.74	\$9.04	\$9.28	\$8.82	2.7
125	\$21.25	\$21.19	\$21.10	\$21.20	\$19.47	\$18.12	-14.7
250	\$42.23	\$42.12	\$40.49	\$40.49	\$37.53	\$33.75	-20.1
500	\$83.34	\$83.10	\$76.66	\$78.98	\$67.61	\$59.83	-28.2
1000	\$166.12	\$165.65	\$148.95	\$154.02	\$135.22	\$119.66	-28.0

To obtain best price we reviewed the tariffs for basic MTS, Reach-Out -America, AnyHour Savings, True Rewards, True USA, and True Savings. We calculated the best available price for each of the 60 customers profiles contained in the Joint Bell Companies June 9, 1995 Comments, Attachment B, Reply Affidavit of Paul W. MacAvoy, Appendix B, 16-8, 10-12. Those profiles consisted of distributions of mileage and time of day for different calling volumes. For each profile we calculated the best price from the above tariffed pricing plans. Finally, we calculated the simple average for each volume level (number of minutes per month).

APPENDIX C

STATEMENT OF AFFIRMATIVE VOLUNTARY COMMITMENTS IN SEPTEMBER 21, 1995 AT&T EX PARTE LETTER (AS CLARIFIED IN OCTOBER 5, 1995 AT&T EX PARTE LETTER)¹

AT&T, in its September 21, 1995 letter (as clarified by its October 5, 1995 letter), states that it commits to the following provisions:

1. AT&T will continue to comply with all conditions and obligations contained the various Commission orders regarding rate integration between the contiguous forty-eight states and the states of Alaska, Hawaii, Puerto Rico and the Virgin Islands, until or unless those orders are superseded by Congressional or Commission action.²
2. AT&T will comply with all the conditions and obligations contained in the Commission orders associated with AT&T's purchase of Alascom, Inc., including the Alascom Authorization Order, the Market Structure Order, and the Final

¹ This appendix summarized only AT&T's affirmative commitments contained in its September 21, 1995 Ex Parte letter, as clarified by its October 5, 1995 Ex Parte Letter.

² These include, but are not limited to, the following: Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, Docket No. 16495, Second Report and Order, 35 FCC 2d 844 (1972) recom. Memorandum Opinion and Order, 38 FCC 2d 665 (1972); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, FCC 76-665, Memorandum Opinion, Order and Authorization, 61 FCC 2d 380 (1976); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, FCC No. 77-364, Memorandum Opinion and Order, 65 FCC 2d 324 (1977); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, FCC 79-419, Memorandum Opinion and Order, 72 FCC 2d 215 (1979); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Joint Board Final Recommended Decision, 9 FCC Rod 2197 (1993) (Final Recommended Decision); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Memorandum Opinion and Order, 9 FCC Rod 3023 (1994) (Market Structure Order).

Recommended Decision³

3. AT&T will file any new geographically specific tariffs that depart from its traditional approach to geographic averaging for interstate residential direct dial services on five (5) business days notice. Such tariff transmittals will be clearly identified as affecting the provisions of this commitment. This will continue for three years unless the Commission adopts rules addressing this issue for all carriers or there is a change in federal law addressing this issue.
 4. AT&T will limit price increases, if any, for 800 Directory Assistance provided pursuant its tariff FCC No. 2 and for interstate Analog Private Line services provided pursuant to its tariff FCC No. 9 to a maximum increase in any year of no more than the increase in the Consumer Price Index (CPI). AT&T will file such tariff changes increasing the prices for these services on not less than five (5) business days notice and such tariff transmittals will be clearly identified as affecting the provisions of this commitment. This Commitment will continue for a term of three years
 5. a. AT&T will offer for three years a calling plan for low income residential consumers that allows them to place one hour of interstate direct dial service at a rate frozen at 15% below current basic schedule rates. These customers also may enroll in AT&T's other discount programs. Qualification criteria for customers on this plan will be those established by state Public Utility Commissions for implementing the Commission Lifeline and Link-up programs. AT&T will extend this offer to customers who participate in the state aid program used to determine qualification in the Lifeline or Link-up in that state, to areas in a state not currently covered by an approved Lifeline or Link-up plan. Customers in those areas may enroll in this offer by demonstrating their participation in that state aid program. The State of Delaware currently does not participate in either Lifeline or Link-up. Therefore, AT&T will qualify Delaware customers for this offer based on their participation in a public assistance program identified in consultation with the Delaware Public Utility
- ³ See In re Application of Alascom Inc., AT&T Corporation and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation, File Nos. W-P-C-7037, 6520, Order and Authorization, FCC No. 95-334 (rel. Aug. 2, 1995) (Alascom Authorization Order); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Joint Board Final Recommended Decision, 9 FCC Rod 2197 (1993) (Final Recommended Decision); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Memorandum Opinion and Order, 9 FCC Rod 3023 (1994) (Market Structure Order), adopting Final Recommended Decision, 9 FCC Rod 2197 (1994).

Commission.

b. AT&T will offer for three years an interstate direct dial service for low volume residential consumers that allows them to purchase calling at guaranteed rates. For the first year, callers will pay \$3.00 per month for the initial 20 minutes, and calling in excess of the first 20 minutes will be priced on a postalized basis at the rate of \$0.25 per minute for peak (Day period) calling and \$0.15 per minute for off-peak (Evening and Night/Weekend period) calling. During the second year the service will be priced at \$3.00 for the initial 20 minute period and no higher than \$.27 per minute for peak and \$.16 per minute for off-peak overtime calling. During the third year the service will be priced no higher than \$3.25 for the initial 20 minute period and no higher than \$.27 per minute for peak calling and \$.16 per minute for off-peak calling.

c. AT&T will notify its customers of the availability of the plans in (a) and (b) through a bill message every third month when their usage in that month is below \$10. In addition, AT&T will develop a consumer outreach program that will include, among other things, the following: (i) AT&T will implement a national and local public information program notifying the public of the availability of these offers; (ii) AT&T will inform the consumer advocates participating on the AT&T Consumer Panel and other national and local consumer groups of the availability of these offers; (iii) AT&T will train its customer service representatives on the provisions of these offers and insure their understanding of the application of these offers to a customer's particular calling pattern.

d. AT&T will file changes to its average residential interstate direct dial services on not less than five (5) business days notice, if those changes, 1) increase rates more than 20% for customers making greater than \$2.50 in calls per month, or 2) increase the average monthly charges more than \$.50 per month for customers making less than \$2.50 in calls per month. Such a determination will be made on the basis of average per minute charges separately for the Day, Evening and Night/Weekend time periods and determining the impact on customers of the proposed change by comparing the existing and proposed price over all minutes of use levels. AT&T will calculate a separate weighted average of rates for all mileage bands (weighted by the relative number of minutes for each mileage band) for the Day time period, the Evening time period, and the Night/Weekend time period. AT&T will calculate the impact of a rate change on a one-minute-per-month Day caller, a two-minute-per-month Day caller, a three-minute-per-month Day caller, etc., and will perform similar calculations for a hypothetical caller who called during the Evening hours and a hypothetical caller who called only during Nights/Weekends. The 20% and \$.50 commitments apply on a cumulative basis in a calendar year. Such tariff transmittals will be clearly identified as affecting the provisions of this commitment. In addition, AT&T will offer for a period of three years an interstate optional calling plan that will provide residential consumers a postalized rate of no more than \$0.35 per minute for peak calling and \$0.21 per minute for off-peak.

e. In the event of significant change in the structure of the interexchange industry, including a significant repricing or restructure of access rates, AT&T may file tariff changes to these plans on not less than five (5) business days notice. Such tariff transmittals will be clearly identified as affecting the provisions of this commitment. This commitment does not apply to services provided via access service obtained from a new entrant to a local access market, unless those access rates are comparable to those charged by the incumbent local exchange access provider.

6. AT&T will comply with the following which reflects an agreement between AT&T and the Telecommunications Resellers Association: As a general practice, AT&T grandfather both existing customers and subscribed customers (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, 2, 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and it commits to continue that process. In exceptional cases, however, grandfathering may not be appropriate either because (1) a change is necessitated by typographical errors, a service inadvertently priced below costs, rate changes where no individual rates (post-discount) are increased, or other comparable circumstances, or (2) the change is necessary to bring clarity to a non-rate term or condition, where it is necessary to treat all customers alike (such as a change to the provisions for how orders are processed, but not including changes to the body of Contract Tariffs, Tariff 12 Options or Tariff 15 CPPs). In such circumstances, AT&T commits for a twelve-month period to offer its customers the following additional protections not required of non-dominant carriers:

- where AT&T makes any change to an existing term plan, AT&T will afford the affected customers 5 days meaningful advance notice of the tariff filing to give the customer the opportunity to object; provided, however, that for changes to discontinuance with or without liability, deposits and advance payments, or transfer or assignment of service, AT&T will file on 14 days notice. (AT&T would have the unaffected right to change underlying tariff rates -- such as a general change to SDN rates -- unless the term plan protected the customer from such changes.) Where the affected customer(s) agrees to the revision, AT&T will note that agreement in its transmittal letter and file the change on 1 day's notice. Where the affected customer objects to the change, AT&T will file the change with the Commission on 6 days notice. With respect to the 14 or 6 days notice filings, the substantial cause test will be applicable to the same extent as it is today.

7. AT&T will present to the Common Carrier Bureau quarterly performance results on reseller order processing. AT&T will also report such results to the Telecommunications Resellers Association Executive Board. This commitment will continue for a term of one year.
8. For a minimum of 12 months, AT&T will provide a telephone number and

"ombudsman" to receive reseller complaints not resolved through AT&T's first single point of contact, the account manager, and to route them to the appropriate person at AT&T for assistance in responding to those complaints. Additionally, Commission employees who receive such calls may refer them to the AT&T escalation contact.

10. AT&T will comply with the following, which reflects an agreement between AT&T and the Telecommunications Resellers Association: is willing to establish a quick, efficient, commercially-oriented process for resolving disputes with its reseller customers. AT&T is willing to enter into mutually agreeable private party arbitration agreements with these parties. AT&T is also willing to develop with the Telecommunications Resellers Association Executive Board a model two-way Arbitration Agreement. AT&T would be willing to enter into such an agreement with any of its reseller customers for resolution of commercial disputes between the reseller and AT&T under the following guidelines:

- a) The Arbitration Agreement would be based on the United States Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association.
- b) The Arbitration Agreement would bind each party to arbitration as the exclusive remedy for any covered claims that arise in the period covered by the agreement. The covered period initially would be twelve months, but the reseller will be permitted to end the covered period earlier by providing at least 30 days prior written notice.
- c) Covered claims would include all claims between the parties relating to tariffed services, the carrier-customer relationship between the parties, or competitive practices, except claims that a tariff provision or practice is unlawful under the Communications Act would not be covered claims. Covered claims would include, for example, claims that AT&T has misapplied or misinterpreted its tariffs, that the customer has failed to comply with its tariff obligations, or that either party has engaged in unlawful competitive practices such as misrepresentation or disparagement.
- d) The Arbitration Agreement would provide for a 90 day arbitration process, unless the parties agree to a longer period.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*

In the order adopted today, the Commission concludes that, because AT&T lacks market power in the interstate, domestic, interexchange market, AT&T's motion to be reclassified as a non-dominant carrier with respect to that market should be granted. Clearly, the reclassification of AT&T as a non-dominant carrier will have several effects. AT&T will be freed from price cap regulation for its residential and other domestic service offerings.¹ Pursuant to our tariff filing rules for non-dominant carriers, AT&T will be permitted to file tariffs for all of its domestic services on one day's notice and, furthermore, the tariffs will be presumed lawful. Depending upon the proposed activity, several Section 214 requirements will either be reduced or eliminated by declaring AT&T non-dominant.² AT&T will, however, still have to file a Section 214 application should it want to discontinue, impair, or reduce service.³ Finally, declaring AT&T as a non-dominant carrier will relieve it from some annual reporting requirements, including requirements that it file several ARMIS-like reports, an annual financial report, and a report on access minutes.

It is important to note that our decision today does not remove AT&T from regulation. Like other non-dominant carriers, AT&T will still be subject to regulation under Title II of the Communications Act of 1934, as amended. Indeed, non-dominant carriers are required to offer interstate services under rates, terms, and conditions that are just, reasonable, and not unduly discriminatory.⁴ Non-dominant carriers are also subject to the Commission's complaint process established pursuant to Sections 206 through 209 of the Act.⁵

I am pleased to support the Commission's action today on a number of levels but, most notably, from the economic and public interest perspectives. While some parties have argued in the record that it is premature and unjustified to grant AT&T's motion, I find that the record clearly demonstrates that AT&T no longer exercises, or has the ability to exercise, market power in the domestic, interstate, interexchange market. Indeed, maintaining the status

¹ Since the Commission deferred consideration of AT&T's market power in international markets, AT&T's provision of International Message Toll Service (IMTS) will remain under price cap regulation.

² See 47 U.S.C. § 214; 47 C.F.R. § 63.07.

³ 47 C.F.R. § 63.71.

⁴ 47 U.S.C. §§ 201-202.

⁵ 47 U.S.C. §§ 206-209.

quo and regulating AT&T as a dominant carrier would, in my view, unnecessarily continue asymmetric regulation and regulatory imbalance to the detriment of the American consumer. As a dominant carrier, AT&T was required to file tariff revisions on as many as 120 days' notice.⁶ Its non-dominant competitors, however, were able to file tariff revisions on only one day's notice. It is not an intellectual stretch to theorize that much of the "lock-step" pricing that has been alleged could have been caused by our tariff regulation. I believe that, by declaring AT&T non-dominant, we are making the interstate, interexchange market more susceptible to full competition that will result in better prices and service innovation.

Our decision today follows a sequence of reasoned regulatory actions that reflect a rapidly and profoundly changing market. In 1989, the Commission adopted a price cap regime for AT&T that was intended to, and I believe succeeded in, encouraging AT&T to provide service more efficiently. As early as 1991, the Commission recognized that competition in the interstate, interexchange market had increased and, accordingly, streamlined regulation of AT&T's provision of business services (except analog private line) and toll-free 800 service (except 800 directory assistance). Earlier this year, the Commission streamlined the regulation of AT&T's commercial services for small business customers.⁷ Thus, today's decision to grant AT&T's request for regulatory reclassification is a natural progression from a situation in which AT&T clearly dominated the market and in which regulation of AT&T was warranted, to a highly competitive market that consists of four strong facilities-based carriers and hundreds of service resellers and in which close regulation of AT&T is no longer necessary.

I am also convinced that, from a public interest perspective, granting AT&T's motion will not have any drastic results on consumers. I have been assured that reclassifying AT&T as non-dominant will not adversely affect rates for residential services. The record shows that an increasing number of AT&T customers are selecting discount plans rather than paying AT&T's basic rates. One only needs to turn on the television or open a newspaper to be bombarded by advertising by AT&T, MCI, and Sprint, encouraging us to switch to their service and select their specific discount pricing plan. Furthermore, an analysis of the record reveals that, even with increasing basic schedule rates, between 1991 and 1995, AT&T's lowest discounted residential rates available to customers with monthly bills over \$10 fell between 15 and 28 percent. To the extent that parties in this proceeding have raised concerns about recent increases in basic schedule rates, these concerns appear to raise questions about the performance of the interexchange industry as a whole and not about AT&T's individual market power. Finally, AT&T has made several voluntary commitments to protect low-income and low-volume customers from rate "spikes," to provide customers more service options at reasonable rates, and to constrain further increases in basic schedule rates.

6 Price cap service price changes were filed by AT&T on 14 days' notice and filings for new services, annual adjustments, below-band filings, or rate structure changes were filed on 45 days' notice.

7 Revisions to Price Cap Rules for AT&T Corp., 10 FCC Rod 3009 (1995).

AT&T has also made voluntary commitments with respect to business term plans and long-term contracts with customers and resellers. Without these voluntary commitments, by operation of the Filed Rate Doctrine, AT&T could file, on one day's notice, tariff revisions that could materially change and effectively abrogate an existing long-term contract. I commend AT&T, the Ad Hoc Telecommunications Users Committee, and the resale industry for coming together and, in a cooperative spirit, discussing and reaching agreement on some of these complex issues.

In the near future, I look forward to examining on a broader level the entire domestic, interstate, interexchange market. Commenters on AT&T's motion have raised several important issues that should be explored in the generally applicable rulemaking context. For example, the Commission should consider in such a rulemaking issues concerning rate integration and geographic rate averaging, the resale market, the operator services market, and the allegation of tacit collusion among Sprint, MCI, and AT&T.

I would like to commend the staff and management of the Common Carrier Bureau and Office of General Counsel for a job well done in considering this complex matter.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Motion of AT&T Corporation to be Reclassified as a Non-Dominant Carrier*

Today, in another substantial stride down a deregulatory path, the Commission declares AT&T to be "non-dominant." Once again, increased competition is the basis for decreased regulation.

Sixteen years ago, as long distance competition began to mature and bear fruit, the Commission began the *Competitive Carrier* rulemaking. The primary purpose of this proceeding was to calibrate our requirements to market conditions, so that interexchange carriers could be freed of unnecessary governmental interference and agency resources could be deployed more efficiently. Over the years, rules affecting authorization for new construction, tariff filing periods, pricing justifications, and the like have been substantially eased for what were once called the "other common carriers." But, ever since the outset of *Competitive Carrier*, AT&T has been labeled the "dominant carrier."

Time has passed, and conditions have changed. So, too, must the Commission's response.

AT&T was first characterized as dominant before its divestiture of 22 operating companies, with their control over local telephone bottlenecks in communities from coast to coast. Before the divested companies and other local exchange carriers implemented equal access, so that MCI, Sprint, and others could enjoy interconnections that were equal in type, quality, and price to those which were available to AT&T. And before 800 number portability enabled AT&T's toll-free service customers to change carriers without having to change telephone numbers.

Over the years since *Competitive Carrier* was initiated, the market for interexchange services has been transformed. Today, virtually all consumers have the opportunity to choose from four or more primary interexchange carriers for 1-plus dialing. AT&T's market share is now closer to 60 percent than 90 percent. Tens of millions of consumers change their interexchange carriers each year. MCI, Sprint, and lesser carriers have the capacity to handle a substantial portion of the traffic currently carried by AT&T -- either immediately or in relatively short order.

The Commission has not ignored these market changes; as competition has grown, the Commission has accommodated AT&T with increased freedoms. In 1985, the Commission eliminated the requirement that AT&T market its enhanced services and customer-premises equipment through a separate subsidiary. In 1989, the Commission freed AT&T from rate-of-return regulation and instead allowed it to operate under price caps. Over the past few years, various AT&T services have been taken out from under price caps, and tariffing requirements have been further streamlined.

Now, based on our present assessment of the overall market for domestic, interstate, interexchange services, it is time to take the next logical step.

Today's ruling will have significant consequences. Residential long distance service, the only service remaining under price caps, will be removed from price cap regulation. Tariff changes will now take place on one-day's notice instead of 14, or 45, or even 120 days' notice. Cost support requirements will be eliminated, blanket Section 214 authority will be extended, and recordkeeping and reporting requirements will be eased.

We grant these additional freedoms on the basis of considerable evidence that AT&T lacks the ability to exercise unilateral market power in the overall interstate long distance market. This is not the same as saying that the interexchange market is perfectly competitive or that the need for all safeguards has vanished. Still, I believe we can appropriately declare AT&T to be "non-dominant" without causing injury to consumers or undermining important public policies, pending a rulemaking in which we will review issues common to all interexchange carriers.

In this regard, I want to commend AT&T for the assurances set forth in its letters of September 21 and October 5, 1995. Although they do not bear directly on the question of AT&T's dominance, these letters tender voluntary commitments on a number of important subjects for varying periods of time.

Most importantly, AT&T has pledged to offer certain pricing options for residential service that will safeguard the interests of low-income and low-volume subscribers. Also, the principle of rate integration for Alaska and Hawaii will be protected, and the Commission will have the opportunity to oversee any deviations from the traditional practice of geographic rate averaging. Rate increases for analog private lines and 800 number directory assistance will be constrained to the inflation rate. Large commercial customers, including resellers, will be able to protect their expectations against disruptions that might otherwise occur under the "filed rate doctrine." Arbitration procedures will be available to speed the resolution of complaints.

In these and other ways, AT&T has facilitated our decision to move away from "asymmetric" regulation of interexchange carriers. In so doing, we abandon some rules that may function more as hindrances to true rivalry than as consumer safeguards. Yet, even as

we continue our efforts to eliminate unnecessary regulations, we must not and will not abandon our public interest responsibilities.

To this end, we will soon initiate a proceeding to review the rules that apply to non-dominant carriers generally. This will enable us to explore which minimally burdensome "rules of the road" should be applied to all carriers. It's essential that we maintain an environment that is hospitable to the continued growth of competition.

* * * * *

We are at a pivotal stage in the evolution of communications markets and common carrier regulation. In long distance, there is now considerable competition -- attributable in part to the long-range vision and steadfast determination demonstrated over the years by our predecessors at the Commission. Now, although this market continues to warrant some degree of attention, our priorities must change.

We can and should be less involved with the interexchange marketplace. There are other markets where competition remains an enticing potential, not a promise fulfilled. In particular, we are necessarily focusing more of our attention on expediting the emergence of competition for local voice and video services. I will work diligently toward the day when genuine, robust competition in local markets permits us to take such significant strides as the one we take today in the case of AT&T.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

In re: Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier

For approximately fourteen years, the FCC has regulated the interstate, domestic, interexchange market by focusing most of its attention on AT&T. The Commission took this approach because it determined that AT&T -- and AT&T alone -- was a "dominant" carrier in that industry, possessing individual "market power" in the antitrust sense. Accordingly, among other regulatory measures, the Commission put in place rules that required careful scrutiny of AT&T's tariff filings before they took effect to ensure that the carrier's rates, terms and conditions were just, reasonable and not unduly discriminatory.

Consistent with its view that other interexchange carriers were "non-dominant," i.e., lacked market power, the Commission did not accord the same high level of regulatory scrutiny to AT&T's competitors. For example, for a period of time, there was no tariff filing requirement imposed on the non-dominant carriers; at present, they are subject to a one day tariff filing requirement.

This dichotomous method of regulation was conceived, born, and nurtured when AT&T both controlled the long distance and local exchange markets. Much has changed in a decade and a half. AT&T shed itself of its bottleneck local exchange facilities to settle an antitrust action. Equal access is available throughout virtually the entire nation. Competition has been injected by the Commission in the interstate, domestic, interexchange market. New facilities-based interexchange carriers have emerged, and the market has several muscular competitors with nationwide networks. Independent resellers have thrived and add diversity to the menu of service offerings available to customers. Customers have become more sophisticated in choosing a long distance service provider, and have demonstrated a willingness to change service providers to obtain a service plan that serves their needs best. AT&T's market share has declined. But despite the evolution of this once-monolithic industry into a more vibrant competitive market, the Commission continued to focus most of its attention on AT&T pursuant to its dominant/non-dominant regulatory regime.

Against this backdrop, two years ago, AT&T petitioned the Commission to declare that it no longer is a dominant carrier possessing market power in the interstate, domestic, interexchange market. Today, the Commission grants AT&T's long sought relief. I support this action because I believe the record demonstrates that AT&T no longer is dominant in the relevant market.

Moreover, this decision is consistent with my regulatory philosophy. As a fundamental matter, I believe that competition should trump regulation. If a market is competitive, let market forces work. With competition on the rise, the Commission should reduce outdated regulation as much as possible and as quickly as possible, consistent with our obligations under the Communications Act.

In addition, I favor regulatory parity, and by this I mean that similarly situated competitors should be treated similarly under our rules. AT&T is now subject, among other regulatory measures, to specific tariff filing requirements and exacting, pre-effective tariff review. In contrast, AT&T's competitors - MCI, Sprint, and other interexchange carriers - do not wear the shackles of these heavy regulatory requirements. Instead, AT&T's competitors enjoy the freedom of streamlined regulation. This regulatory disparity has resulted in unfair competition between the marketplace participants. While AT&T jumps through regulatory hoops at the FCC, its competitors can often win in the marketplace by dashing straight towards the finish line with competitive offerings.

In my view, a vigorous competitive market requires a fair start and equally applicable rules. In specific, the public interest is ill-served by a regulatory process that builds in delay for one service provider and forces it to show its hand to its competitors before it can introduce new service offerings or rate reductions in the market. I am especially pleased that the practical effect of today's decision is to narrow this regulatory disparity and bring AT&T's regulation more closely into line with that of its non-dominant competitors.

Further, I believe regulators must constantly reexamine existing approaches to see if they continue to make sense in the current market environment. It is clear that the days of regulating this particular market by focusing on one major player should be over. We need a new paradigm for this industry that is fair and that reflects the market as it exists today. I thus support the decision to begin a proceeding to examine this industry and decide what, if any, generic rules need to be developed to address specific issues or public policy concerns. I believe such a proceeding ought to begin promptly.

My consideration of any such rules will be guided in large part by the principles enunciated above. Thus, when competition is working, I would prefer to eliminate unnecessary existing rules and to shy away from imposing any new regulatory requirements. To the extent that new regulations are warranted - because competition is inadequate or compelling public policy concerns suggest a regulatory response - in my view, the Commission should craft narrow rules that apply equally to one class of carriers, rather than towards one competitor.

While I support this decision to answer the narrow question AT&T posed in its petition, I stress that our work is not finished. I believe we should be proactive in our approach to update our regulations governing this entire market, and we ought to seek ways to expedite the trend toward full competition, and less regulation, in this market.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
FCC 95-431

In re Applications of
Golden West Broadcasters
For Construction Permit for Minor
Change to the Facilities of Station
KLIT(FM), Glendale, California
For Renewal and Extension of
Special Temporary Authority
File No. BPH-920128IB

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1995

Released: December 11, 1995

By the Commission:

1. The Commission has before it the captioned minor change application of Golden West Broadcasters ("Golden West"). Golden West, licensee of Station KLIT(FM), Channel 27.0B, Glendale, California, seeks an increase in effective radiated power ("ERP") from 2.4 to 4.8 kilowatts. In association with its power increase request, Golden West requests waivers of 47 C.F.R. §§73.211(b) and (c) and §73.213(a). No other changes in technical facilities are requested, and KLIT is to continue operating from its present transmission site. Also before the Commission is Golden West's December 28, 1993 "Request For Renewal And Extension of Special Temporary Authority." For the reasons set forth herein, the waiver requests and application are granted, and the related request for an extension of Special Temporary Authority (STA) is dismissed.

2. **Background.** Golden West asserts that the increase is necessitated by KLIT's inability to provide an actual city-grade

signal to any more than 46 percent of its community of license.¹ Golden West attributes this coverage defect to terrain considerations and claims that only the proposed power increase will overcome reception difficulties.

3. Golden West notes that from 1952 to 1969 KLIT operated with superpower facilities from a site in Glendale. In 1968 the city declined to renew the tower site lease, at which time the current Mt. Wilson site presented the only feasible alternative. According to Golden West, the licensee of KLIT at that time applied to relocate to Mt. Wilson and to operate with superpower facilities equivalent to those authorized at the Glendale site, but this proposal was rejected, inasmuch as it would have extended KLIT's 1 mV/m contour beyond that produced from Glendale. Golden West asserts that the licensee followed the "suggestion" set forth in the staff letter rejecting the relocation application and amended its proposal by "drastically" reducing ERP from 82 to 0.67 kW.² Golden West argues that the staff suggestion that this would render the relocation proposal acceptable seemed to confirm that the Mt. Wilson site would allow for adequate city coverage. Golden West maintains, however, that the "meager" facilities authorized in 1968³ resulted in a city-grade signal to less than 30 percent of Glendale and that line-of-sight obstacles led to "severe" shadowing, multipath interference, and "mixing" problems. According to Golden West, the staff failed to recognize that the 1968 proposal was contrary to the city coverage and line-of-sight provisions of 47 C.F.R. §73.315.

4. Golden West recounts several subsequent unsuccessful licensing and rulemaking attempts to rectify KLIT's technical problems prior to entering into a previous settlement agreement with the licensee of Station KJLH(FM), Channel 27.2A, Compton, California. According to Golden West, in light of that earlier agreement the Commission in 1989 granted KLIT's application increasing ERP to 2.4 kW at Mt. Wilson, waived §73.211 and, implicitly, waived §73.213(a), referencing Golden West Broadcasters ("Golden West"), 4 FCC Rcd 2097 (1989). Golden West maintains that in so acting the Commission specifically found that, based on field strength measurements, KLIT's city-grade signal covered less than 30 percent of Glendale.

5. Golden West now claims that the 1989 power increase was insufficient to allow for adequate service to Glendale. It

¹ Pursuant to the coverage prediction methodology set forth in 47 C.F.R. §73.313, KLIT currently provides adequate city-grade coverage.

² The application specified 0.64 kW.

³ See K.U.T.B., INC., 1 FCC Rcd 938 (1986).

asserts that in prosecuting its 1988 power increase application it never claimed that a grant would enable it to fully comply with §73.315.⁴ According to Golden West, reception difficulties are evidenced by "constant" complaints from listeners and advertisers. Referencing Revisions of FM Broadcast Rules, Particularly as to Allocations and Technical Standards, 40 FCC 720, 724 (1962), Golden West maintains that the Commission itself is aware that the Los Angeles, California area is a "very problematic" place in which to provide FM service. In this regard, Golden West again points to "highly irregular" terrain.

6. The KLIT proposal is inconsistent with §§73.211(b) and (c). Although KLIT currently operates with facilities exceeding the Class B maxima, it seeks a continued waiver of §73.211(b) as well as §73.211(c). Golden West proposes to extend KLIT's 1 mV/m field strength contour towards the respective 1 mV/m contours of grandfathered short-spaced stations KIOZ(FM), Channel 27.1B, Oceanside, KTOT(FM), Channel 26.9A, Big Bear Lake, and KJLH. Referencing §73.213(a) as well as Policy with respect to agreement between short-spaced FM stations ("Agreement between short-spaced FM stations"), 57 FCC 2d 1263 (1975), Golden West asserts that the Commission considers, on an ad hoc basis, facilities increases for short-spaced stations in situations where those stations agree to mutual facilities improvements and where a sufficient public interest showing is made. Golden West has entered into such agreements with the KIOZ, KTOT, and KJLH licensees. Maintaining that a §73.213 waiver is not required in light of these agreements and its public interest showing, Golden West, nevertheless, requests one "out of an overabundance of caution."

7. Golden West argument. Golden West argues that the only viable option for KLIT is to increase power at its Mt. Wilson site. According to Golden West, relocation towards Glendale would exacerbate the existing grandfathered short-spacing to KJLH, whose licensee opposes all such efforts.⁵ In contrast, and noting a recent settlement agreement with the KJLH licensee,⁶ Golden West argues that the proposed KLIT power increase would

⁴ Golden West did, however, assert that the Commission erred in concluding that KLIT (formerly KMPC-FM), provided an adequate city-grade signal to Glendale. 4 FCC Rcd 2098.

⁵ The transmitting sites of KLIT and KJLH are separated by 37.1 kilometers, 31.9 kilometers less than the normal 69 kilometers specified in 47 C.F.R. §73.207(a) for a Class B and a Class A station operating two channels apart.

⁶ Golden West and Taxi Productions, Inc. entered into a December 14, 1992 settlement agreement providing, in part, that each would withdraw a Petition to Deny against the other's facilities modification application. The KJLH modification application (File No. BPH-920731TH) remains pending.

result in no actual objectionable interference to KJLH.

8. Golden West next argues that grant of its proposal will benefit the public interest. Referencing Commission concern that licensees provide service to their communities, Golden West notes that KLIT is the only FM facility licensed to Glendale and asserts that §307(b) of the Communications Act of 1934, as amended, in particular, calls for the provision of a city-grade signal to that community. Golden West adds that a secondary benefit from a grant will be KLIT service to expanded areas and populations.⁷ Golden West also implies that traffic safety would be enhanced when drivers' attentions are no longer diverted by the need to adjust car receivers to account for fading of the KLIT signal.⁸

9. Golden West asserts that public interest benefits could be realized from a grant of its proposal without adversely affecting other stations. In this regard, it notes that pursuant to the previously noted mutual facilities improvement agreements, it and the licensees of KIOZ, KTOT, and KJLH, respectively, have bilaterally consented to accept interference resulting from contemplated facilities improvements. According to the applicant, although the proposed KLIT 48 dBu interfering contour would theoretically overlap the proposed KIOZ 54 dBu service contour,⁹ terrain conditions between their transmitting sites would prevent any actual overlap. Further, Golden West states that even if, *arguendo*, such an overlap did occur, the affected area is otherwise well served.¹⁰ As to KTOT's existing and anticipated operations, Golden West likewise asserts that the area in which interference would theoretically occur is well served.¹¹

⁷ According to Golden West, KLIT operations at 4.8 kW will enable that station to serve an additional 355,250 persons in 1,760 square kilometers with a 54 dBu signal and an additional 571,072 persons in 1,783 square kilometers with a 60 dBu signal. Golden West also maintains that implementation of the mutual facilities improvement agreements will enable KIOZ, KTOT, and KJLH to serve additional areas and populations.

⁸ Golden West cites no authority for its claim that traffic safety is a relevant public interest benefit justifying approval of mutual facilities improvement agreements or its waiver requests, and none is apparent.

⁹ Pursuant to its agreement with Golden West, the KIOZ and KTOT licensees have applied for license modifications (File Nos. BPH-910612ID and BPH-930924IA, respectively).

¹⁰ Golden West asserts that this area is currently served by at least five and perhaps as many as 16 FM and two full-time AM stations and that the area also receives daytime service from another AM station.

¹¹ According to Golden West, five FM stations now provide a 60 dBu or stronger signal, and three other stations serve portions of the affected area.

10. Golden West argues that a grant of its proposal will not result in interference to second adjacent channel KJLH. Citing Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, ("Directional Antennas"), 6 FCC Rod 5356, 5362 (1991), Golden West asserts that interference between second adjacent channel stations occurs where the undesired signal is 40 dB greater than the desired signal. Golden West argues that there is precedent for utilizing the 40 dBu ratio standard of 47 C.F.R. §73.215(a)(2) in determining the onset of second adjacent channel interference in the course of allowing a station to improve its signal to its community of license. Otherwise stated, Golden West indicates that the undesired signal must be at least 100 times greater than the desired signal. Noting that KJLH is entitled to Class A protection to its 60 dBu contour, Golden West asserts that there will be no interference from the proposed KLIT operations, since KJLH's existing predicted 60 dBu contour will not be overlapped by KLIT's proposed 100 dBu contour. Further, Golden West claims that no such overlap will occur even if KJLH operates with increased power as proposed. (As provided in the mutual facilities improvement agreement with Golden West, the KJLH licensee has applied for a power increase to 5.6 kW (File No. BPH-920731IH.) Golden West characterizes any resultant interference to KLIT from KJLH as "negligible." According to Golden West, although KLIT, as currently authorized, theoretically receives interference from KJLH in an area within 590 meters of the KJLH tower, no such interference has ever been reported. And, states Golden West, KLIT operations as proposed would be subject to interference from KJLH's current facilities in an area within 417 meters of that tower. Golden West also maintains that if both stations operate as proposed, KLIT will receive interference in an area of 659 meters around the KJLH tower. Further, Golden West asserts that the area in which KLIT could be expected to receive interference from KJLH would actually be reduced if KLIT's power increase proposal is granted.

11. Use of the standard predictive method indicated that the proposed KLIT operations would cause interference to KTOT, KJLH, and KIOZ within their nominally protected areas. Representatives of Golden West, seeking to address concerns about interference should KLIT be permitted to operate as proposed, requested informal meetings with the staff. Subsequently, the applicant submitted three amendments to its application, dated April 13, May 4, and May 12, 1993, respectively. According to Golden West, these amendments respond to questions raised by the staff during the informal meetings. Golden West indicated in the amendments that the engineering data, derived from "Technote 101" studies, demonstrated that any interference to either KTOT, KIOZ or KTOT within their respective 54 dBu service contours would be minimal due to terrain factors. The staff examined the data and formats of these amendments and informed the applicant that it

was unable to agree that no unacceptable interference would result from enhanced KLIT operations. On August 10, 1993, the applicant requested STA to operate KLIT with 4.8 kW for a period of thirty days in order to test the effect of enhanced facilities on KIOZ. Specifically, Golden West sought to conduct field strength measurements "and other tests" to ascertain the existence of resultant interference. The STA request was granted,¹² and Golden West conducted tests pursuant to the ratio method as well as listening tests to determine the extent of interference to KIOZ. The application was further amended on December 28, 1993, pursuant to which Golden West submitted its conclusions regarding the STA tests. Golden West claims therein that tests conducted utilizing methodology prescribed by Mass Media Bureau staff and consistent with 47 C.F.R. §73.314 demonstrate a lack of cognizable interference to KIOZ in areas where theoretical predictions suggest it would occur. According to Golden West, the lack of interference is attributable to terrain elevations between the KLIT and KIOZ transmitters.

12. Golden West argues that there is precedent for a grant of the instant proposal, the most compelling being the 1989 action in *Golden West*, *supra*, increasing KLIT's power to 2.4 kW. According to Golden West, in waiving §73.211 therein, the Commission implicitly waived §73.213(a). Golden West references language in *Golden West* noting inadequate city coverage, the impracticality of relocating KLIT's transmitter closer to Glendale, and the fact that no signal degradation would result from the increase as well as a citation to *Communico Hani Corp.* ("Hani"), 72 FCC 2d 89 (1979), for the proposition that the public interest benefits of enhanced coverage can outweigh the benefits of adhering to the maximum power restrictions.¹³ Golden West argues that the 1989 circumstances are "indistinguishable" from the present ones and that, as in 1989, the additional coverage sought will not provide KLIT with an unwarranted competitive advantage. According to Golden West, however, the instant proposal represents KLIT's "last hope" of providing adequate service to Glendale.

13. Golden West also argues that the principle of favoring city coverage vis-a-vis maintaining power/height restrictions and the prohibition against contour extensions has guided recent Commission actions. According to Golden West, a grant of its

¹² See Letter to Irving Gastfreund from the Chief, Audio Services Division, Mass Media Bureau, December 6, 1993 (reference 180083).

¹³ Hani involved a request to waive the maximum power limit in order to compensate for unusual terrain which would otherwise cause deficient principal community coverage. In "tipping the balance" between the power restriction and coverage requirements, the Commission addressed a situation where a grant of the requested waiver would, presumably, enable the applicant for a new facility to fully comply with §73.315.

proposal would also comport with recent Commission pronouncements indicating a policy of increasing station power so long as no interference to other stations results.

14. Golden West's last argument is that grant of its proposal will not engender a significant number of similar requests. It references circumstances unique to the instant situation, such as KLIT's inability to provide an adequate city grade signal, its existing "patently" deficient signal, its inability to relocate closer to its community due to interference and spacing concerns, its claim that no other station will be adversely affected, "substantial" public interest benefits, including enhancement of city grade service from the only FM station licensed to a community, mutual facilities improvement agreements with all affected short-spaced stations, and the fact that Los Angeles is a complicated area in which to improve an FM facility.

15. Discussion. The unique circumstances in this case warrant a grant of Golden West's facilities increase request. As discussed below, the applicant presents evidence that terrain barriers will preclude actual, as opposed to theoretical, resultant increases in interference to other stations, there are mutual facilities increase agreements with all potentially affected stations, there is an acknowledged lack of ample city grade coverage of KLIT's community of license, and a grant of Golden West's application will not open the floodgates to a spate of similar requests.

16. Section 73.213(a) of the Commission's Rules deals with grandfathered short-spaced stations. That rule provides initially, in pertinent part, that the facilities of an FM station authorized prior to November 16, 1964 and which does not meet the standard separation distances to other facilities may be modified only where the station's 1 mV/m contour is not extended toward the corresponding contour of another short-spaced station. Despite this provision against enhancement of the facilities of grandfathered short-spaced stations, the rule does provide for mutually agreed on facilities increases in situations involving a showing of public interest benefit. The Commission subsequently adopted a Public Notice entitled "Commission Reaffirms Policy With Respect To Agreements Between Short-Spaced FM Stations," 57 FCC 2d 1263 (1975). In that Public Notice the Commission reemphasized the need for a public interest showing and specified that in considering public interest benefits it would account for areas and populations which will receive both primary service and interference. Since it appears, as noted, that implementation of KLIT's proposed power increase would result in additional primary service, particularly to its community of license, and since it further appears that there would be no actual interference generated in areas now receiving service from another station, the public interest standard is

met.

17. The referenced 1975 Public Notice also clearly sets forth the Commission's position that "In no event will a (mutual facilities increase) proposal be favorably considered which provides for facilities in excess of the maximum power...limitations set forth in section 73.211(b)...." This language mirrors language in §73.213(a) indicating that the provision for mutual facilities increases pertains to grandfathered short-spaced stations which are authorized to operate at no more than as specified in §73.211. However, KLIT, by virtue of Commission action in *Golden West*, *supra*, is already authorized to operate with facilities in excess of those otherwise permitted by §73.211. Thus, this limiting provision of §73.213(a) is not specifically applicable to the current KLIT situation.

18. An examination of Golden West's data concerning the STA test results reveals that the applicant is correct in asserting that enhanced KLIT operations will not result in actual interference to KIOZ within the latter's nominally protected service area. However, this is not due, as Golden West claims, to a lack of KLIT signal penetration; the STA test data indicates that the KLIT signal does, in fact, reach the area of predicted interference. Rather, it appears that KIOZ's signal at the measurement sites is either nonexistent or so weak as to be barely measurable. Section 73.314(a) provides, in pertinent part, that field strength measurements may be submitted to demonstrate that the Commission's technical standards do not properly reflect resultant interference or signal propagation. However, the rule further provides that test results may be submitted only in the context of rule making proceedings. Thus, although the measurements and tests conducted by Golden West pursuant to the STA conformed to suggestions of the staff, acceptance of the results does not constitute a change in Commission policy, and the limitation of the rule remains in effect. Of importance, the field strength measurements submitted by Golden West are being used to demonstrate only coverage, not interference. The action taken herein should not be taken as approval of the use of field strength measurements as an alternative to the interference prediction method based on contours specified in the Rules.

19. The action taken herein does not reflect a change in Commission policies. Potential applicants are advised that such action is limited to the unique circumstances of Golden West's situation. First, a licensed facility cannot adequately provide its community with a city-grade signal as called for in §73.315

of the Rules.¹⁴ Second, this deficiency is caused by terrain factors—a mountainous "barrier" to the KIOZ signal—obviously beyond the control of the licensee. Third, there is no practical alternative by which to enhance city coverage aside from the proposed solution. Fourth, KLIT is a pre-1964 grandfathered short-spaced station. Fifth, KLIT is already authorized to operate with facilities in excess of those otherwise provided for in the rules.¹⁵ Sixth, it has been empirically demonstrated that the service of no other short-spaced stations within their protected contours would, in fact, be adversely affected. Seventh, there is no opposition to Golden West's proposal, particularly from licensees of stations which arguably could be adversely affected. Finally, all short-spaced stations potentially affected have entered into mutual facilities upgrade agreements with the applicant.

20. The action herein granting the requested waivers and application renders moot Golden West's STA extension request. Thus, no further discussion is warranted.

21. Accordingly, in light of the above, IT IS ORDERED, That the requests for waiver of 47 C.F.R. §§73.211(b) and (c) and 73.213 filed by Golden West Broadcasters ARE GRANTED. IT IS FURTHER ORDERED, That the associated application for a construction permit for a minor change to the facilities of Station KLIT(FM), Glendale, California (File No. EMP-9201281B) IS GRANTED. IT IS FURTHER ORDERED, That the associated request for renewal and extension of Special Temporary Authority IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁴ That rule, in pertinent part, sets forth the Commission's preference that a transmitter be situated so that a 70 dBu, or 3.16 mV/m, contour be provided. Here, a staff analysis of Golden West's proposal indicates that, based on the applicant's measurement data, effectuation would result in a 51.3 percent city grade signal over Glendale. A minimum of 50 percent coverage is considered adequate. See *Pathfinder Communications Corporation (WJZZ-FM)*, 3 FCC Rod 4146, 4147, note 3 (1988).

¹⁵ See paragraph 17, *supra*. As noted, KLIT's present facilities were authorized by Commission action in *Golden West*, *supra*.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Motion of Southwestern Bell) CWD-95-5
Mobile Systems, Inc. For a)
Declaratory Ruling That Section 22.903)
and Other Sections of the)
Commission's Rules Permit the)
Cellular Affiliate of a Bell Operating)
Company to Provide Competitive)
Landline Local Exchange Service)
Outside the Region in Which the)
Bell Operating Company is the)
Local Exchange Carrier)

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1995

Released: October 25, 1995

By the Commission:

I. INTRODUCTION

1. This Order addresses the Motion for Declaratory Ruling ("Motion"), filed on June 21, 1995, by Southwestern Bell Mobile Systems Incorporated ("SBMS"), seeking clarification of Section 22.903 of the Commission's rules, 47 C.F.R. § 22.903, regarding limitations on the provision of out-of-region landline exchange services.¹ In the Motion, SBMS, a cellular affiliate of Southwestern Bell Telephone Company ("SWBT"), requests that the Commission clarify that neither Section 22.903 nor any other section of the Commission's rules imposes separate subsidiary or other structural safeguards on the provision of out-of-region landline local exchange service by the cellular affiliate of a

¹ Section 22.903 of the Commission's rules was amended effective Jan. 1, 1995. See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, CC Docket No. 92-115, 9 FCC Red 6513 (1994) (*Part 22 Rewrite*).

Regional Bell Operating Company ("RBOC").² SBMS contends that the rules permit the cellular affiliate of an RBOC, acting on its own behalf or through a closely-integrated corporate affiliate, to provide landline local exchange service, both indirectly (through resale) and directly through the ownership or lease of landline local exchange facilities, provided that the proposed service is outside the region in which the RBOC affiliated with the cellular carrier is the Local Exchange Carrier ("LEC").

2. In a Public Notice issued June 29, 1995, the Wireless Telecommunications Bureau sought comment on SBMS's Motion. The Bureau also asked commenters to address whether the requested relief should be granted by other means if the requested declaratory ruling could not be granted. We received three timely-filed comments, two late-filed comments, and one reply comment in this proceeding.³

II. BACKGROUND

3. The SBMS Motion seeks an interpretation of Section 22.903 of the Commission's rules, which governs the conditions under which BOCs may provide cellular service. Section 22.903 provides, in pertinent part, that:

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U.S. West, Inc., their successors in interest and affiliated entities (BOCs) may engage in the provision of cellular service only in accordance with the conditions in this section, unless otherwise authorized by the FCC. BOCs may, subject to other provisions of law, have a controlling or lesser interest in or be under common control with separate corporations that provide cellular service only under the following conditions:

(a) Access to landline facilities. BOCs must not sell, lease or otherwise make available to the separate corporation any transmission facilities that are used in any

² The term Bell Operating Company ("BOC") is used in the text of Section 22.903 to refer to the seven regional holding companies which own and control the 22 Bell Operating Companies. For purposes of this Order, we use the term Regional Bell Operating Company ("RBOC") to refer to these seven regional holding companies.

³ By Public Notice, the Wireless Telecommunications Bureau ordered comments to be filed by July 17, 1995. See Public Notice, DA 95-1454, "Wireless Telecommunications Bureau Seeks Comment on Southwestern Bell Mobile System's Request for Declaratory Ruling on Provision of 'Out-of-Region' Competitive Landline Local Exchange Service by a Cellular Affiliate of a BOC," rel. June 29, 1995. The Illinois Commerce Commission ("ICC") requested an extension until July 20, 1995 to file comments, which the Bureau granted. See Order, CWD-95-5, rel. July 13, 1995. Nextel Communications, Inc. ("Nextel") and Ameritech Corporation ("Ameritech") filed comments on July 17 and ICC filed comments on July 20. Bell Atlantic Corporation ("Bell Atlantic") and Time Warner Telecommunications ("TWT") also filed comments on July 20. Because the extension granted to ICC did not apply to Bell Atlantic or TWT, we treat their comments as late-filed, but will consider their arguments nonetheless.

way for the provision of its landline telephone services, except on a compensatory, arm's length basis. *Separate corporations must not own any facilities for the provision of landline telephone service.* Access to landline exchange and transmission facilities for the provision of cellular service must be obtained by separate corporations on the same terms and conditions as those facilities are made available to other entities.

(b) *Independence.* Separate corporations must operate independently in the provision of cellular service. Each separate corporation must: (1) maintain its own books of account; (2) have separate officers; (3) employ separate operating, marketing, installation and maintenance personnel; and, (4) utilize separate computer and transmission facilities in the provision of cellular services.

47 CFR § 22.903(a) and (b) (emphasis added).

4. The original version of Section 22.903 was adopted as Section 22.901 in 1981, when the Commission amended Part 22 of the rules to provide for the authorization of two cellular licensees in each market — one wireline carrier and one non-wireline carrier.⁴ In order to deter wireline carriers from using their market power to engage in anticompetitive practices in the provision of cellular service, the Commission required all wireline carriers to establish separate subsidiaries to provide cellular service.⁵ Section 22.901(b) also was added to the rules and stated, in pertinent part, that wireline cellular licensees "may not own facilities for the provision of landline telephone service."⁶ These restrictions were placed on all wireline carriers to prevent them from "using predatory pricing tactics or misallocating the shared costs of cellular and conventional wireline service" The Commission reasoned that "this [restriction] should make the detection of anticompetitive conduct somewhat easier for regulatory authorities."⁷

⁴ Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, *Report and Order*, CC Docket No. 79-318, 86 FCC 2d 469 (1981) (1981 Order). Originally, the Commission had adopted a one-system-per-market policy for cellular service, with the license in each market to be held by the local exchange carrier. Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974); *recon. granted in part*, 51 FCC 2d 945, *clarified* 55 FCC 2d 771 (1975), *aff'd sub nom.* NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). On reconsideration, the restriction that prevented non-wireline carriers from providing cellular service was lifted. 51 FCC 2d at 945.

⁵ 1981 Order at ¶¶ 48-52.

⁶ 47 CFR § 22.901(b) (1981).

⁷ 1981 Order, 86 FCC 2d 469 at ¶ 48.

⁸ *Id.* at ¶¶ 48-52.

5. In 1982, the Commission revised Section 22.901 to apply separate subsidiary requirements for cellular only to AT&T and its affiliates.⁹ The Commission determined that in the case of wireline carriers unaffiliated with AT&T, the costs of structural separation outweighed the benefits stemming from the separate subsidiary requirement. The Commission concluded that informal complaint procedures and strict interconnection requirements would adequately protect against improper activity by these carriers in the provision of cellular service.¹⁰ In the case of AT&T, however, the Commission determined that AT&T's size and historically dominant position in the telecommunications industry gave it the unique ability to engage in anticompetitive activities with respect to cellular that would be difficult to detect absent structural separation.¹¹ The Commission noted that continuing to impose separate subsidiary requirements on AT&T would protect against possible cross-subsidization or interconnection abuses linked to AT&T's control of bottleneck LEC facilities.¹²

6. In 1983, the Commission further amended Section 22.901 in response to the breakup of AT&T under the divestiture agreement entered into by AT&T and the Department of Justice.¹³ Under the divestiture agreement, the 22 BOCs owned by AT&T were divested and consolidated into seven regional holding companies.¹⁴ Accordingly, the Commission amended Section 22.901 to delete the reference to AT&T and instead applied the separate subsidiary requirements to each holding company and its affiliates. Thus, the *BOC Separation Order* amended Section 22.901(b) to read as follows:

Neither Ameritech Information Technologies Corp., Bell Atlantic Corp., BellSouth Corp., Nynex Corp., Pacific Telesis Group, Southwestern Bell Corp., or US West, Inc., their successors in interest, nor any affiliated entity, may engage in the provision

⁹ Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, CC Docket No. 79-318, 89 FCC 2d 58 (1982) (1982 Order).

¹⁰ 1982 Order, 89 FCC 2d 58 at ¶ 45-46.

¹¹ 1982 Order, 89 FCC 2d 58 at ¶ 46. The costs of structural separation for AT&T were identified as the duplicative staffs and diseconomies resulting from separate transmission facilities.

¹² *Id.* at ¶ 43-45.

¹³ Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, *Report and Order*, CC Docket No. 83-115, 95 FCC 2d 1117, ¶¶ 3-4 (1983), *aff'd sub nom.*, Illinois Bell Telephone Co. v. FCC 740 F.2d 465 (7th Cir. 1984) (*BOC Separation Order*).

¹⁴ *U.S. v. American Telephone & Telegraph Company and U.S. v. Western Electric Company*, Modification of Final Judgement, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (*MTF*).

of cellular service except as provided for in paragraphs (c) and (d). . . .

The separate subsidiary requirements and other conditions imposed under Section 22.901 otherwise remained unchanged, including the provision stating that entities listed in 22.901(b) "may not own any facilities for the provision of landline service."

7. The final revision of the separate subsidiary requirement occurred in the 1994 *Part 22 Rewrite Order* as part of our comprehensive reorganization of Part 22 of our rules. In that Order, Section 22.903 was amended to incorporate the provisions of former Sections 22.901(b) and (c).¹⁵ No substantive change to the rule was proposed or adopted, however. Thus, Section 22.903 imposes the same separate subsidiary requirements as the predecessor rule, and continues to provide that cellular carriers affiliated with RBOCs "must not own any facilities for the provision of landline telephone service."

III. CONTENTIONS OF PARTIES

8. In its Motion, SBMS states that as the cellular affiliate of SWBT, it currently provides cellular service in several markets outside of SWBT's LEC service area, including Chicago, Boston, Washington/Baltimore, and several markets in upstate New York.¹⁶ SBMS now proposes to provide what it describes as "competitive landline local exchange" ("CLLE") service in some or all of these markets as well.¹⁷ According to SBMS, this will enable SBMS to offer "one-stop shopping" to the public through integrated offerings of CLLE and wireless services. For example, CLLE users potentially would be able to use a device that operates as a landline-based cordless telephone within a building and as a cellular telephone when taken outside.

9. SBMS proposes to provide CLLE through a corporate entity that shares facilities, systems, and personnel with SBMS's cellular operation, and that is managed by the same officers and directors as SBMS. SBMS contends that such an arrangement is permissible under Section 22.903, *i.e.*, that SBMS may offer CLLE service on an integrated basis with SBMS' cellular service without creating a structurally separate entity.¹⁸ SBMS asserts that the original purpose of Section 22.903 was to protect against anticompetitive activity by RBOCs in the provision of cellular service within their LEC service areas. At the time the rule was first adopted, SBMS contends, the Commission did not contemplate that cellular licensees would provide service outside the service areas of their RBOC affiliates.

¹⁵ *Part 22 Rewrite at Appendix A-40.*

¹⁶ SBMS Motion at 1-ii, note 1.

¹⁷ SBMS Motion at ii. SBMS initially proposes to provide integrated cellular and CLLE services in Rochester, New York. SBMS also has applied with the Illinois Commerce Commission for permission to provide CLLE service in the Chicago area.

¹⁸ SBMS Motion at 4; *see also*, SBMS Motion at 13, note 11.

Therefore, SBMS argues, the rule should be interpreted to allow SBMS to own landline facilities and provide local exchange service on an integrated basis with its cellular service outside the LEC service area of the SWBT.

10. In further support of its Motion, SBMS argues that allowing the integrated provision of CLLE will serve the public interest by promoting competition in the provision of landline local exchange service. CLLE service, SBMS notes, will provide a competitive alternative to existing LECs in the markets where it is offered.¹⁹ SBMS also argues that there is no threat of competitive harm from allowing SBMS to provide CLLE without being required to create a separate subsidiary. SBMS emphasizes that all of its cellular operations will continue to be structurally separated from those of SWBT, as required by Section 22.903,²⁰ and that it will provide CLLE service only in markets where the existing LEC is someone other than SWBT.

11. Most of the comments in response to the Motion are supportive of SBMS's objective of providing local exchange competition, but commenters differ on whether SBMS's request for declaratory ruling is an appropriate vehicle to accomplish this objective.²¹ Ameritech supports SBMS's Motion, stating that grant of the motion will facilitate the further development of full and fair competition across the breadth of the telecommunications marketplace.²² Ameritech suggests three modifications to the relief requested by SBMS: that (1) the Commission extend the requested relief to all RBOC cellular affiliates;²³ (2) "out-of-region" service should be defined on the basis of the RBOC's state-specified local exchange certification areas;²⁴ and (3) relief should be extended to all RBOC affiliates, because the structural separation rules serve to handicap RBOC enterprises in the marketplace.²⁵

12. Bell Atlantic argues that an interpretive ruling is not the appropriate forum to

¹⁹ SBMS notes that it is not seeking to acquire the existing LEC in any market, and does not request a ruling that would permit it to do so. *See* SBMS Motion at ii-iii, note 3.

²⁰ SBMS also argues that the structural separation requirements of Section 22.903 for in-region cellular service are questionable, and should be eliminated. SBMS does not seek a determination of this issue in its request for declaratory ruling, however. *See* SBMS Motion at 26.

²¹ TWT Comments at 4, Bell Atlantic Comments at 2, ICC Comments at 3-4.

²² Ameritech Comments at 1-2.

²³ *Id.* at 8.

²⁴ *Id.* at 5-6.

²⁵ Ameritech Comments at 8-9.

address SBMS's proposal.²⁶ Instead, Bell Atlantic urges the Commission to initiate a rulemaking that would reexamine the separate subsidiary requirements for RBOCs providing cellular service, whether in-region or out-of-region.²⁷ Bell Atlantic notes that these rules were developed before the AT&T divestiture and are long overdue for a comprehensive review. Time Warner Telecommunications ("TWT") states that it is supportive of SBMS's motion, but requests that the Commission condition its action on requiring SBMS to unbundle the features and functions of its cellular network (e.g. unbundling air time and interconnecting its switches with switch-based resellers) to make them available to SBMS's landline and wireless competitors, including TWT.²⁸

13. The Illinois Commerce Commission (ICC) also argues that SBMS's motion is too narrow and that the Commission instead should initiate a general review of its cellular rules by issuing a Notice of Inquiry ("NOI").²⁹ The National Association of Regulatory Utility Commissioners ("NARUC") supports ICC's position, and notes that any proposed changes to any aspect of the federal and state multi-jurisdictional frameworks that distinguish between cellular and landline services must be carefully examined.³⁰ The ICC believes that an NOI is needed to address a variety of issues related to the promotion of effective competition in wireline services.³¹ For example, while the ICC acknowledges that "there may be inherent efficiencies to be gained by allowing physical facilities to be used to provide both landline and cellular telecommunications," it is concerned that states' abilities to regulate intrastate telecommunications services may be restricted if SBMS is allowed to provide out-of-region CLLE.³² The ICC also argues that SBMS's Motion requires a determination of the extent to which a company providing both cellular and landline services would be subject to the same rules and regulations applicable to other carriers providing landline services.³³ For example, the ICC contends, the rules under which landline/cellular companies operate may be

²⁶ Bell Atlantic Comments at 1-2.

²⁷ *Id.* at 2-3.

²⁸ TWT Comments at 4-5.

²⁹ ICC Comments at 2.

³⁰ NARUC Comments at 9. On October 11, 1995, NARUC submitted a "Request for Authorization to File Out-of-Time, Alternate Request for 'Ex Parte' Treatment and Comments of the National Association of Regulatory Utility Commissioners." We hereby accept these late-filed comments and consider them in this Order.

³¹ ICC Comments at 3-4.

³² ICC Comments at 6-7. See also, NARUC Comments at 9. "[I]t is critical that States' abilities to regulate intrastate telecommunications services are not inadvertently restricted or preempted." *Id.*

³³ ICC Comments at 9.

inconsistent with the rules applied to landline companies providing PCS.³⁴ Finally, the ICC objects to any effort to roll back existing RBOC/cellular structural separation requirements affecting in-region service without a comprehensive rulemaking proceeding.³⁵

14. SBMS's Motion is opposed by Nextel on procedural and substantive grounds. Nextel first contends that Section 22.903 is clear on its face and, therefore, there is no controversy or uncertainty that requires resolution by declaratory ruling.³⁶ Assuming a question of interpretation exists, Nextel contends that SBMS's request is premature, because of the uncertain state of Commission's policies for development of wireless competition and the possibility of legislation that would allow RBOC entry into interLATA markets.³⁷ Nextel also criticizes SBMS for not addressing how its integration proposal would allocate joint and common costs to separate regulated services from nonregulated services, or how allowing SBMS to provide integrated CLLE would affect RBOC joint ventures comprised of PCS and both in-region and out-of-region cellular operations.³⁸ In addition, Nextel argues that SBMS does not address how it will separate its in-region and out-of-region cellular operations.³⁹ Nextel notes that SBMS has not proposed any rules that would substitute for structural separation.⁴⁰

15. In its reply comments, SBMS asserts that none of the commenters dispute its core contention that the rationale for structural separation does not apply when an RBOC cellular affiliate is operating out-of-region of the affiliated RBOC.⁴¹ SBMS also argues that resolution of its request by declaratory ruling is appropriate, because it presents a narrow legal issue regarding the proper interpretation of Section 22.903. To the extent that commenters urge the Commission to initiate a broader inquiry or rulemaking, SBMS argues that their comments are beyond the scope of the proceeding and are not relevant to its resolution, although SBMS also agrees such a broader proceeding would be desirable.⁴²

³⁴ ICC Comments at 6, 9.

³⁵ ICC Comments at 14.

³⁶ Nextel Comments at 1.

³⁷ *Id.* at 14-15.

³⁸ *Id.* at 11-12.

³⁹ *Id.* at 12.

⁴⁰ *Id.* at 9-10.

⁴¹ SBMS Reply Comments at 2.

⁴² SBMS Reply Comments at 3-4.

IV. DISCUSSION

16. As a threshold matter, we find merit in SBMS's contention that when the language in Section 22.903 was first adopted, the Commission did not contemplate RBOCs providing out-of-region cellular service. Nevertheless, we conclude that the relief requested by SBMS is not amenable to a grant by declaratory ruling. On its face, Section 22.903 makes no distinction between in-region and out-of-region cellular service provided by an RBOC affiliate. Thus, a literal reading of the rule indicates that an RBOC-affiliated cellular licensee must maintain structural separation from the RBOC, regardless of where it provides service. Similarly, the prohibition in Section 22.903(a) on cellular affiliates owning landline equipment appears to apply whether the cellular licensee is providing service in-region or out-of-region. The Commission has not previously considered the distinction between in-region and out-of-region service.

17. In its reply comments, SBMS requests that if the Commission is unable to grant a declaratory ruling, it should issue SBMS a waiver of Section 22.903 to the extent necessary to allow it to provide integrated CLLE service.⁴³ Although we decline to interpret Section 22.903 by declaratory ruling as requested by SBMS, on our own motion, we will treat SBMS's petition as a request for waiver.⁴⁴ The Commission may exercise its discretion to waive a rule where there is "good cause" to do so,⁴⁵ because the particular facts would make strict compliance with the rule inconsistent with the public interest.⁴⁶ Waiver thus is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will better serve the public interest than adherence to the general rule.⁴⁷ Further, the Commission's grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.⁴⁸ We believe that the differential treatment resulting from a waiver would not undermine competition or otherwise violate the Communications Act. For the reasons stated below, we find that SBMS has made the required showing.

18. As a general matter, we find that rigid application of Section 22.903 to SBMS's CLLE proposal would not serve the public interest objectives of the rule. As noted above, the restrictions in Section 22.903 were placed on the RBOCs to prevent them from "using predatory pricing tactics or misallocating the shared costs of cellular and conventional

⁴³ *Id.* at 8, note 6.

⁴⁴ See Sections 1.3 and 22.19 of the Commission's rules, 47 C.F.R. §§ 1.3, 22.19.

⁴⁵ *Id.*

⁴⁶ *WAT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

⁴⁷ *Id.* at 1157; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴⁸ *Northeast Cellular*, 897 F.2d 1166.

wireline service"⁴⁹ In particular, the Commission expressed concern that without structural separation, RBOCs could favor their own cellular affiliates through improper cross-subsidization or discriminatory interconnection practices.⁵⁰ Accordingly, Section 22.903 requires structural separation between SBMS's cellular activities and SWBT's landline local exchange activities. Because SBMS is structurally separate from SWBT, however, we see no need to impose *additional* structural separation requirements on SBMS to the extent it seeks to provide landline service in conjunction with its out-of-region cellular service. First, the existing safeguards insulating SBMS from SWBT already prevent SBMS from using its affiliation with SWBT to cross-subsidize either cellular or CLLE. Second, there is little risk of SBMS being able to obtain preferential local exchange access in areas not served by SWBT. Thus, requiring additional safeguards to separate SBMS's cellular operations from its CLLE operations would serve no purpose.

19. We further conclude that requiring SBMS to create a structurally separate entity to provide CLLE would impose a significant and unnecessary regulatory burden on a potentially valuable service. To provide CLLE on a competitive and cost-effective basis, SBMS proposes to integrate landline facilities with its existing cellular network and switches.⁵¹ SBMS also plans to combine cellular and CLLE operations, such as credit confirmation, billing and collection, customer care, and financial control.⁵² Finally, SBMS intends to offer customers "one-stop shopping" and unified billing for combinations of wireline and wireless service.⁵³ We agree with SBMS that this proposed integration of wireless and landline services offers substantial benefits to consumers by avoiding duplicative costs, increasing efficiency, and enhancing SBMS's ability to provide innovative service. If we were to impose structural separation requirements, SBMS would be precluded from using its existing cellular facilities, switches, systems and personnel to provide CLLE service, and these benefits largely would be lost.

20. We also find that granting a waiver to SBMS to provide integrated CLLE will promote significant Commission objectives by encouraging local loop competition. The development of wireless services is one of several potential sources of competition that we have identified to bring market forces to bear on the existing LECs.⁵⁴ We have noted that

⁴⁹ 1981 Order, 86 FCC 2d 469 at ¶ 48.

⁵⁰ 1982 Order, 89 FCC 2d 58 at ¶ 43-45.

⁵¹ SBMS Motion at 13-14.

⁵² *Id.* at 14.

⁵³ SBMS Motion at 14.

⁵⁴ In the Matter of Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, 9 FCC Red 1687 (1994) at ¶ 2 (allocation of spectrum for new wireless services, along with Open Network Architecture Tariffs, expanded interconnection, 800 data base technology, and video dialtone, "are all examples

"[e]fficient provision of wireless service may also create alternatives for those not served by traditional wireline providers and should create competition for existing wireline and wireless services."⁵⁵ Allowing SBMS to provide CLLE will help to introduce such competition in the markets where SBMS operates. Moreover, because SBMS intends to integrate wireline services with its existing cellular infrastructure in these markets, it has the potential to provide competitive choices to the public rapidly.

21. In granting a waiver to SBMS, we do not discount the comments of those who urge us to undertake a broader inquiry into the structural safeguards applicable to RBOCs, the relation between our regulation of cellular and our regulation of PCS, and other similar regulatory issues. We do not agree, however, that granting relief to SBMS is premature until all such issues have been resolved. The waiver granted by this Order is limited in scope in that it waives the existing structural safeguards applicable to RBOCs in the case of out-of-region activities by a cellular licensee that is already insulated from its RBOC affiliate. The waiver also does not address issues relating to in-region activities by RBOC-affiliated cellular licensees or questions of cellular/PCS comparability. TWT contends that competitive landline exchange providers should be required to unbundle their services. Rather than address TWT's claims in the narrow setting of this proceeding involving a limited waiver of our structural separation rules, we intend to address TWT's claims in the larger context of a rulemaking. In the interim, we believe it is appropriate to allow SBMS to continue to offer service on a bundled basis in light of the fact that SBMS provides primarily cellular service on an out-of-region basis.⁵⁶ We agree with commenters as to the importance of these issues, but they are beyond the scope of this proceeding and therefore can and should be dealt with separately. We emphasize that granting the limited relief requested by SBMS at this time should not be construed as a prejudgment of any of these issues.

22. We also disagree with ICC and NARUC that relief should not be granted to SBMS because of uncertainty regarding the extent of state regulation of combined cellular/landline service. Our decision does not affect states' authority to regulate landline service within their jurisdictions. Thus, it does not relieve SBMS of its obligation to receive authority from the ICC, subject to the same criteria as any other applicant, for the provision of local exchange services.⁵⁷ Our decision removes a federal barrier to SBMS's provision of

of the increasing capability of the telephone network, and all contribute to making that network open to market forces").

⁵⁵ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) at ¶ 7.

⁵⁶ See Bundling of Cellular Customer Premises Equipment and Cellular Service, *Report and Order*, 7 FCC Rcd 4028 (1992). The Commission concluded that it is in the public interest "to allow cellular CPE and cellular service to be offered on a bundled basis, provided that the cellular service is also offered separately on a non-discriminatory basis." *Id.* at 4029.

⁵⁷ ICC Comments at 11.

out-of-region wireline service, but does not preempt state authority over intrastate services. Regarding ICC's concern that we retain structural separations for in-region service, we agree that this issue should not be addressed in this proceeding, but do not believe it precludes granting the narrow relief requested by SBMS.

23. Finally, we note that this ruling in no way relieves SBMS of any restrictions that may be imposed by the Modification of Final Judgment on its ability to provide out-of-region landline service. Under the MFJ, the District Court has allowed the RBOCs to provide cellular and other wireless services across LATA boundaries.⁵⁸ If SBMS's proposed provision of landline service also were to extend across LATA boundaries, however, it would require separate analysis under the MFJ's inter-LATA service restrictions. Because our concern is with the application of the Commission's rules, not enforcement of the MFJ, we see no need to address this issue here.⁵⁹ Thus, SBMS remains responsible for seeking any relief that may be necessary from the Department of Justice and the District Court before implementing its CLLE proposal.

24. Based on the above, we conclude that Section 22.903 should be waived to the extent necessary to allow SBMS to provide CLLE in areas not served by SWBT. As suggested by Ameritech, we will define SWBT's service area based on the local exchange certification areas specified by the relevant state authorities. Because we are acting on SBMS's motion by waiver, this Order does not apply to any other RBOC-affiliated cellular entity that may seek similar relief. We are prepared, however, to entertain similar requests by such entities who propose to offer out-of-region landline service under the same conditions as SBMS, and we will evaluate such requests under the standards articulated in this Order.⁶⁰ We delegate to the Wireless Telecommunications Bureau the authority to act on any requests that present substantially similar situations.⁶¹

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Motion for Declaratory Ruling

⁵⁸ See, e.g., *U.S. v. Western Electric Co.*, Slip Op. (D.D.C. January 28, 1987); *U.S. v. Western Electric Co.*, Slip Op. (D.D.C. September 6, 1988). Most recently, the District Court granted a motion by the RBOCs to modify Section 10(D) of the MFJ to allow them to provide wireless service across LATA boundaries. See, *U.S. v. Western Electric Co.*, Slip Op. (D.D.C. April 28, 1995).

⁵⁹ See, e.g., *Application of New York SMSA Ltd. Partnership*, 58 Rad. Reg. 2d (P&F) 525, 530 (1985); *Application of Bell Atlantic Mobile Systems of Philadelphia, Inc.*, 61 Rad. Reg. 2d (P&F) 141, 143 (1986).

⁶⁰ See *WAT Radio* at 1157.

⁶¹ The Wireless Telecommunications Bureau may act on delegated authority pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

*CORRECTED

FCC 95-428

filed by Southwestern Bell Mobile Systems, Incorporated IS DENIED.

26. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Sections 1.3 and 22.119 of the Commission's Rules, 47 C.F.R. §§ 1.3 and 22.19, a waiver of Section 22.903, 47 C.F.R. § 22.903, is GRANTED to Southwestern Bell Mobile Systems, Incorporated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Advanced Communications Corporation)	
)	
Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System)	File Nos. DBS-94-11EXT
)	
Application for Consent to Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.)	DBS-94-15ACP
)	
Application for Modification of Direct Broadcast Satellite Service Construction Permit)	DBS-94-16MP
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1995

Released: October 18, 1995

* By the Commission: Commissioner Quello dissenting and issuing a statement ;
Commissioner Barrett dissenting and issuing a statement ;
Commissioners Ness and Chong issuing separate statements.

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